Supreme Court, U.S.
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No. 05-782

In The

Supreme Court of the United States

NEBRASKA PUBLIC POWER DISTRICT,

Cross-Petitioner,

v.

U.S. FISH AND WILDLIFE SERVICE, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the United States Fish and Wildlife Service exclude past and present impacts of Missouri River dam operations from the "environmental baseline" for purposes of interagency consultation under the Endangered Species Act, where 50 C.F.R. § 402.02 reads in material part: "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other activities in the action area. . . ."

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were, in addition to the Nebraska Public Power District: American Rivers; Environmental Defense; National Wildlife Federation; Iowa Wildlife Federation; Kansas Wildlife Federation; Montana Wildlife Federation; Nebraska Wildlife Federation; North Dakota Wildlife Federation; South Dakota Wildlife Federation; Izaak Walton League of America; the United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; the United States Fish and Wildlife Service; Gale Norton, Secretary of the United States Department of the Interior; the States of Nebraska and Missouri and Missouri River Energy Services.

This case is part of multidistrict litigation designated as *In re Operation of the Missouri River System Litigation*. *See* 277 F. Supp. 2d 1378 (J.P.M.L. 2003). Parties to the multidistrict litigation included additionally: The States of North Dakota and South Dakota; the Mandan, Hidatsa and Arikara Nation; Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers; Blaske Marine, Inc.; Conocophillips Company; Koch Materials Company; Jebro, Inc.; Coalition to Protect the Missouri River; Memco Barge Line, Inc.; Midwest Area River Coalition 2000, Missouri River Technical Group, and Tosco, a subsidiary of Phillips 66 Company.

CORPORATE DISCLOSURE

The Nebraska Public Power District is a public power district and political subdivision organized under the laws of the State of Nebraska and is not a "non-governmental corporation" for purposes of Rule . . 6.

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.5, the Nebraska Public Power District ("NPPD") cross-petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This cross-petition pertains to *Environmental Defense, et al. v. U.S. Army Corps of Engineers, et al.*, Docket No. 05-631.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 421 F.3d 618 (8th Cir. 2005). No rehearing of that opinion was sought by any party to this litigation. The opinion of the district court is reported at 363 F. Supp. 2d 1145 (D. Minn. 2004).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on August 16, 2005. This Court has jurisdiction over NPPD's cross-petition under Rule 12.5. The Petition for Writ of Certiorari in Docket No. 05-631 was docketed November 16, 2005. The Court has jurisdiction over the original Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

REGULATION AT ISSUE

The regulation at issue is located at 50 C.F.R. § 402.02, which contains a series of definitions applicable to interagency consultations under Section 7(a)(2) of the

Endangered Species Act, 16 U.S.C. § 1536(a)(2). The term "environmental baseline" is located within the definition of "Effects of the Action," which reads as follows:

> "Effects of the Action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

STATEMENT OF THE CASE

I. CONTROL AND DEVELOPMENT OF THE MISSOURI RIVER.

In 1944, Congress explained: "The water of the Missouri River system is a primary national resource which, up to the present time, has been inadequately controlled and developed." S. Doc. No. 191, 78th Cong., 2nd Sess. (1944) at 10. To control and develop the River, Congress

enacted the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944), authorizing the construction and operation of dams and reservoirs on the main stem of the Missouri River. Congress made flood control and navigation the "dominant function" for which the Secretary of War was to manage the reservoirs through the United States Army Corps of Engineers ("Corps"). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 815 (1984); *see also South Dakota v. Ubbelohde*, 330 F.3d 1014, 1019-20 (8th Cir. 2003), cert. denied, *North Dakota v. Ubbelohde*, 514 U.S. 987, 124 S.Ct. 2015 (2004). In addition, the main stem dam and reservoir system provides a wide range of benefits to each of the Missouri River Basin states. Secondary project purposes include water supply, power generation, irrigation, recreation and fish and wildlife. *E.g.*, S. DOC. NO. 247, 78th Cong., 2nd Sess. (1944) at 3; *Ubbelohde*, 330 F.3d at 1020.

As this Court explained in *ETSI*, the Flood Control Act embodies a compromise between two plans envisioned by the Secretary of the Army on the one hand, and the Secretary of the Interior on the other. H. DOC. NO. 475, 78th Cong., 2nd Sess. (1944) ("Pick Plan"); S. DOC. NO. 191, *supra* ("Sloan Plan"); S. DOC. NO. 247, *supra* (reconciling Pick and Sloan). The plans explain what was at stake when they were developed. The Pick Plan notes: "Flood control and the conservation of water resources are urgently needed in the Missouri River basin. The water that now produces floods should be stored and put to beneficial use in the interest of navigation, power development, irrigation, and other useful purposes." H. DOC. NO. 475 at 17. The Sloan Plan explains that "[u]ntil 1940, practically none of its waters were being so used. As an economic or